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(3)

No. 07-383

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID H. and CATHERINE M. VOORHEES,
husband and wife,

Petitioners

v.

BOARD OF ZONING APPEALS OF FAIRFAX COUNTY,
EILEEN M. McLANE,
FAIRFAX COUNTY ZONING ADMINISTRATOR, PJB
LLC, PFK LLC and HALL HOLLIN LLC,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE VIRGINIA SUPREME COURT

REPLY BRIEF FOR PETITIONERS

David H. and Catherine M. Voorhees
8029 Washington Road
Alexandria, Virginia 22308
(703) 765-7551

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REPLY BRIEF FOR THE PETITIONERS

Introduction

The Petitioners' submission is straightforward: The constitutional right to be heard is a basic tenet of government decisionmaking, which includes substantive due process to guarantee fundamentally just and fair governmental action.

I. The Zoning Administrator Did Not Have the Authority to Subdivide Parcels.

It is the **Board of Supervisors**, alone, that has the authority to permit new construction of a dwelling unit on an area of land having a size or width less than required by the zoned district[1] (redevelopment). Otherwise, the new structure would be erected contrary to Article 9, Section 610 of the Zoning Ordinance: "The Board may approve, either in conjunction with the approval of a rezoning or as a special exception, the waiving of the minimum district size and/or lot width requirement for an R District ...".

The waiver ability of the Board of Supervisors is limited. Only lots that do not meet the minimum district size or minimum lot width can be waived if "1. Such lot has not been reduced in width or area since the effective date of this Ordinance to a width or area less than required by this Ordinance." Article 20 of the 1978 Zoning Ordinance defines a lot as follows: "For the purpose of this Ordinance, a parcel of land that is designated at the time of application of ... a Building Permit ..., as a tract all of which is to be used, developed or built upon as a unit under single ownership. ..." Thus, a division of the parcel of land upon

[1] Article 2, Section 306, 4. of the Fairfax County Zoning Ordinance.

which one house was built, in 2005, is a reduction in the lot width and area that occurred after 1978, and the Board of Supervisors would not be permitted to waive the minimum regulations of the R-3, residential district.

The controlling principals of law, upon which Petitioners rely, include all of the provisions of the Zoning Ordinance. The drafters of the 1978 Fairfax County Zoning Ordinance enacted Article 9, Section 610 to authorize **elected** officials (i.e., the Board of Supervisors) to permit new construction on any "lot" that does not meet the minimum size regulations of a zoned district, as smaller lot sizes than that required in the R-district would impact the existing neighborhood.[2] If elected officials cannot waive the minimum size requirements as explained above, non-elected officials (i.e., Zoning Administrator) cannot have that authority.

However, contrary to the foregoing ordinance, in 2005, the Fairfax County Zoning Administrator divided the parcels or consolidated lots identified by the Tax Map Description to include plat lots recorded in 1943 thereby effectively changing the size and width of the parcel or lot that existed in 1978.[3]

The division of the parcels involved in this appeal would result in a de-facto R-5 zoning classification in an R-3 neighborhood, as one BZA member noted[4], or a rezoning without notice or a public hearing. R-5 is a denser zoning classification than R-3 and common sense would dictate that

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[2] The purpose and intent of Article 9 (9-001) states: "There are certain uses ... which by their nature or design can have an undue impact upon or be incompatible with other uses of the land."

[3] BZA Record at page 101.

[4] See page A-13, lines 11-13 in the Petition for Writ of Certiorari.

replacing one house with two houses increases the density of the residential neighborhood.

One lone provision in the Zoning Ordinance does not control numerous other regulations in the Zoning Ordinance, especially when the lone regulation states, "provided all other regulations of this Ordinance can be satisfied."[5] As cited in the Petition for Writ of Certiorari, the County has acknowledged that one provision (§3-301) cannot be met, but has baldly asserted that the lone provision, which requires all other zoning regulations to be satisfied, can be applied. Is this fundamental justice?

Article 2, Section 401 of the Zoning Ordinance only allows a lot that exceeds the minimum provisions of the Ordinance to be subdivided to create new lots which comply with the minimum provisions of the zoning district. The Tax Map Description of the parcels or lots identified by Petitioners conform to the R-3, zoning classification. As Respondents agree, the divided, resultant new lots are smaller than the minimum requirements of the R-3 Zoning district.

Article 3, Sections 301 and 308 of the Zoning Ordinance cannot be satisfied. Similarly, Article 2, Sections 601-602 and Article 17, Section 104 cannot be satisfied. In addition, the decision of the non-elected official is inconsistent with several provisions of the Virginia Code.[6]

If there is a conflict among the regulations of the Zoning Ordinance, it is the regulation that imposes a greater

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[5] See last two lines of Section 2-405 reprinted on page 2 of Respondents' Brief in Opposition.

[6] Va. Code §§ 15.2-2261, 15.2-2284, 15.2-2307, among others.

requirement or a higher standard that applies.[7] Article 9, Section 610 applies a greater requirement (a special exception) and a higher standard (the Board of Supervisors authorization). Thus, a **waiver** of the minimum district size and lot width by the Board of Supervisors is required before new construction can be built on half of the land upon which one house previously stood.

Respondents reliance on *Snow v. Amherst County Board of Zoning Appeals*, 248, Va. 404, 448 S.E. 2d 606 (1994) is misplaced. First, *Snow* is directed to property owners arguing that they have a vested right. Second, the Virginia Assembly amended the Va. Code §15.2-2307 to include the governmental action that they relied upon when expending money to prepare for development of the parcel. In the present case, if a non-elected official can decide to double the density of a neighborhood without notice or a public hearing, adjacent property owners cannot rely upon their zoning classification. Unlike the Snows, the Petitioners here seek to have the present Zoning Ordinance enforced to protect the property rights of the residents of the neighborhood. We ask this Court to review this governmental action.

II. Unfair Assignment of Burden of Proof

Respondents gloss over the proceedings at the BZA, where Petitioners argued that lots recorded in 1943 did not meet all of the minimum requirements of the Zoning Ordinance,[8] as required by Section 2-405 of the Zoning Ordinance, upon which Respondents rely exclusively. Since the County was and is in control of the records from the time of creation in 1943, the burden should have been placed on

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[7] Article 1, Section 400 of the Zoning Ordinance.

[8] BZA Record at pages 473-475.

the County to prove that the plats met all of the requirements of the Zoning Ordinance. See *Williams v. Administrator of NASA*, 463 F.2d 1391 (CCPA 1972), *cert denied* 412 U.S. 950 (1973).

In *Williams*, the Court held:

> We think the wisest course to follow is to fall back to the basic tenets of the law of evidence, three of which should control here - (1) the burden of proof generally lies on the party asserting the affirmative of a proposition, 9 Wigmore on Evidence, § 2486 (3d ed. 1940) or the party seeking to change the present state of affairs, McCormick, Evidence § 337 (2d ed. 1972); (2) Where a party is in a position to have peculiar knowledge of the facts with regard to an issue, the burden of proof as to that issue lies upon that party, id.; and (3) the burden of going forward with the evidence on an issue generally rests upon the party having the burden of proof on that issue. McCormick, Evidence, § 337, supra, 9 Wigmore on Evidence, supra, § 2487. *Williams* at 1400.

In the present case, it is Fairfax County that is asserting that the old 1943 plats met the requirements for recordation, and since the county has had custody and therefore peculiar knowledge of all of the documents that could that support that proposition since 1943, the burden should be on Fairfax County to prove the plats met the recordation requirements in 1943 and not the petitioners. Therefore, since the county did not meet their burden that the old plats met the recordation requirements, then the lots as developed in the late 1940s and early 1950s determine the proper zoning for the neighborhood and not the improperly recorded 1943 plat.

Respondents' reliance on a Subdivision Ordinance that was enacted after the neighborhood in question was completed is misplaced. Va. Code §15.2-2261 states that for five years after recordation of a plat, there can be no change or amendment to a local ordinance so that a developer can complete an approved development.[9] Nowhere does the Code of Virginia provide enabling legislation to permit a developer to redevelop an existing community (create a second development) based on an old recorded map.

To the contrary, the Virginia Code only provides 5 years for the recorded plat to be developed before local ordinances, such as the Zoning Ordinance, trump the recorded plat. Since the plat was recorded in 1943, all Zoning Ordinance regulations after 1948, including the requirements of larger "lot" sizes are effective. Neither Section 101-1-12 of the Fairfax County Code nor Va. Code §15.2-2266 provide exceptions to the current zoning ordinance regulations.

In fact, Va. Code §15.2-2261 requires the plat to be valid in order for the five (5) year exception to new ordinances be applicable.[10] Thus, the fact that the deeds of subdivision are valid only permit the recorded plats with 5 years before all zoning regulations apply. Thus, the valid, recorded subdivision plats must meet all current zoning regulations. It is respectfully submitted that Fairfax County should bear the burden of timely producing all of the regulations of the Zoning Ordinance. See *Williams*.

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[9] §15.2-2261 C. ... , or in the case of a recorded plat for five years after approval, no change or amendment to any local ordinance, map, resolution, rule, regulation, policy or plan adopted subsequent to the date of approval of the recorded plat or final site plan shall adversely affect the right of the subdivider or developer or his successor in interest to commence and complete an approved development ...

[10] E. The provisions of this section shall be applicable to all recorded plats and final site plans valid on or after January 1, 1992.

Neither Va. Code §15.2-2266 nor Subdivision Ordinance Section 101-1-12 support Respondents' assertion. Those two regulations do not waive zoning approval. A development different than the recorded plat was created, and in 1978, the developed land was zoned according to its existing use of one house per two recorded plot lots. Despite this evidence, it was the adjacent homeowners' burden to disprove Fairfax County's unsupported assertions.

III. Petitioners Chose To Represent Themselves *Pro Se.*

By Order of the Circuit Court on July 16, 2006[11], petitioners were deemed *pro se* parties. In accordance with the order, petitioners proceeded to file their brief to the Circuit Court as *pro se* parties. As is clear from the cited portions of the Circuit Court transcript, counsel was appointed at the hearing.

IV. Substantive Due Process Was Denied When County Divided Consolidated Lots, Thereby Increasing Density In Their Restatement Of Petitioner's Appeal.

The Legal Notice was the first time Petitioners became aware that Fairfax County was reframing the appeal of the adjacent property owners. Despite sending a letter to the BZA indicating that the appealed issue should be "Appeal of a Zoning Administrator's determination that an existing conforming use can be redeveloped into a non-conforming use,"[12] the record that Respondents mention includes the Fairfax County staff report that based its report on the appeal

[11] Appendix F attached to the Petition for Writ of Certiorari.
[12] BZA Record at pages 289-336.

in the Legal Notice,[13] and the regurgitation of the Fairfax County staff report at the BZA hearing.[14]

Since the BZA heard from Fairfax County staff before hearing Petitioners, the single parcel of land upon which one house stood had already been divided into two by the assertion of Fairfax County staff. Thus, in the BZA's mind, before Petitioners argued their case, two parcels (or lots) of land were present. Under the County staff's reasoning, the division occurs at the time a house is torn down, regardless of zoning classification. Under the Subdivision Ordinance[15], a parcel of land cannot be divided without notice to adjacent property owners. Without any notice to property owners and before the appeal of the Zoning Administrator's determination, Fairfax County staff effectively rezoned our neighborhood to R-5 without due process under the 14th Amendment to the United States. Petitioners are requesting that all Zoning Ordinance provisions be followed.

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[13] BZA Record at pages 110-219.

[14] BZA Record at pages 470-472.

[15] Section 101-2-1(B) of the Fairfax County Subdivision Ordinance.

Conclusion

For these reasons and the reasons stated in the petition, the petition for writ of certiorari should be granted.

Respectfully Submitted,

Catherine M. Voorhees

and

David H. Voorhees

both of: 8029 Washington Road
Alexandria, VA 22308
703 765-7551

APPENDIX

Excerpt of § 1-400 of the Zoning Ordinance

PART 4 1-400 CONFLICTING ORDINANCES

Whenever any provision of this Ordinance imposes a greater requirement or a higher standard than is required in any State or Federal statute or other County ordinance or regulation, the provision of this Ordinance shall govern. Whenever any provision of any State or Federal statute or other County ordinance or regulation imposes a greater requirement or a higher standard than is required by this Ordinance, the provision of such State or Federal statute or other County ordinance or regulation shall govern. ...

Excerpts of §§ 2-306 and 401 of the Zoning Ordinance

2-306 Lot Size Requirements

1. In this Ordinance, lot size requirements are expressed in terms of:

A. Minimum district size.

B. Minimum lot area.

C. Minimum lot width.

2. In the R-C through R-4 Districts, minimum lot area and lot width requirements are presented for conventional subdivision lots, ...

3. Where no minimum district size is specified, the minimum lot area and lot width requirements shall define the minimum district size.

4. Where a minimum district size is specified for a given district, no parcel of lesser size shall be so classified in a given location in the County except by the Board acting on its own motion or except as may be permitted by the provisions of Sect. 9-610; provided, however:

...

B. If the district is an R district and if the same classification exists in a given location, additional lands may be rezoned to such classification if such lands are contiguous to the zoned district, and if such lands are in the same ownership, and if the rezoning of such lands would be in conformance with the adopted comprehensive plan. ...

2-401 Limitations on Subdivision of a Lot

1. Only a lot that exceeds the minimum provisions of this Ordinance may be subdivided to create more lots, and only then where the resultant lots shall themselves meet such minimum provisions, except for a minor adjustment of lot lines or consolidation of lots as may be permitted under Sect. 405 below. ...

Excerpt of § 9-610 of the Zoning Ordinance

Article 9 - Special Exceptions

9-610 Provisions for Waiving Minimum Lot Size Requirements

The Board may approve, either in conjunction with the approval of a rezoning or as a special exception, the waiving of the minimum district size and/or lot width requirement for an R District, except for all cluster subdivisions, the minimum lot area and/or lot width requirements ..., but only in accordance with the following:

1. Such lot has not been reduced in width or area since the effective date of this Ordinance to a width or area less than required by this Ordinance

.

2. The applicant shall demonstrate that the waiver results in a development that preserves existing vegetation, topography, historic resources and/or other environmental features; provides for reduced impervious surface; maintains or improves stormwater management systems; and/or similar demonstrable impact

.

3. It shall be demonstrated that development of the subject lot will not have any deleterious effect on the existing or planned development of adjacent properties or on area roadways.

4. Such waiver shall be approved only if the remaining provisions of this Ordinance can be satisfied.

Excerpt of §101-2-1 of the Subdivision Ordinance

Article 2. Subdivision Application Procedure and Approval Process

Section 101-2-1

Whenever any subdivision of land is proposed, the subdivider shall apply for and secure approval of such proposed subdivision in accordance with the following procedure.

...

(1)(B) Notice required.

(i) Any person who submits ... a construction plan when a preliminary subdivision plat is not required for approval under the provisions set forth in this Section shall submit written proof of notifications of all owners of property wholly or partially within 500 feet of the parcel to be subdivided and at least one homeowners' or civic association within the immediate area as approved by the Department of Public Works and Environmental Services. Such notice shall include notice to owners of properties wholly or partially within 500 feet which lie in an adjoining county or municipality. This notification must be to a minimum of 25 property owners other than the owner of the parcel to be subdivided. If there are fewer than 25 different owners of property wholly or partially within 500 feet of the subject property, then additional notices shall be sent to other property owners in the immediate vicinity so that notices are sent to different owners of not less than 25 properties.

(ii) Notice shall be sent to the last known address of the owner(s) as shown in the current Real Estate Assessment files and shall be sent by certified mail, return receipt requested. ...

(iii) All written notice required by this paragraph shall include the following information:

(1) the tax map reference number;

(2) the street address of the parcel;

(3) the ... construction plan ... name;

(4) the County identification number;

(5) the address and telephone number of the County Office where a copy of the ... construction plan ... may be reviewed or to where questions may be directed;

(6) a description of the proposed development including the number of units, area in acres, and density;

...

(9) a statement that the proposed construction may alter storm drainage from the site;

(10) the name, address and telephone number of a representative of the applicant; and

11) a reduction of the plan or plat showing the proposed development at a scale of 1 inch = 500 feet or larger on 8 1/2 inch by 11 inch sheet(s).

(iv) The notice shall state that:

...

(3) any person wishing to be notified of the approval of the ... construction plan ... should submit a written request to that effect to the County Office identified in the notice;

...